Informal Transcript: Gerry Cohen

Senate Select Committee on Judicial Reform and Redistricting

11/08/17

(3:36:50) My name is Gerry Cohen. Couple background things – I was the primary drafter of the 1987 legislation that resulted in the current superior court system that came out of the Black Lawyers Association case. And on the issue of statewide elected superior court judges I spent a day having my deposition taken in that case by Marshall Hurley and other attorneys.

(3:37:22) Let me start with this overview and I'll try to skim through this. There is a copy of it online. To borrow an analogy, judicial redistricting may be to redistricting as military music is to music. Much of the outline is the same as you are familiar with from having worked on legislative and congressional districts, or even local county or school board redistricting. But some of it is more analogous to county commissioner redistricting.

(3:37:46) I want to touch on six points. First the history of the court system can guide us in understanding the complexities of the system in North Carolina – Michael has done some of that already. One person one vote does not apply the same way it does for other elections. Section II of the Voting Rights Act applies to the process including issues relating to the racial composition of districts, the election itself, and potentially racial issues and like the composition of new districts or double-bunking of incumbents if there is substantial difference on race. As I mentioned, the current system of dividing counties to create superior court districts arose out of a settlement of a section II case filed in 1986 by the Black Lawyers Association. There was no district court or any other opinion in that case. Fourth, the General Assembly is free from time-to-time to divide the state into a convenient number of superior court and district court districts. Fifth, the state constitutional provision in Article VI, Sec. 6a had been historically construed to bar the General Assembly from adding additional qualifications to candidates for office is worth looking at as to the expansion of residency districts that appear in the latest version of HB 717 – and yes I know there have been residency districts dating back 30 years for district court judges, and maybe 100 years for local governments. Lastly, the Wisconsin legislative redistricting case on partisan gerrymandering, and was argued before the U.S. Supreme Court may impact this entire process if indeed the plaintiffs can show some evidence of partisan gerrymandering, and I want to guess we are going to have an opinion from the Supreme Court by February or March, and that might inform this process.

(3:39:31) Prior to the 1962 constitutional amendment unifying the state court system that arose out of the Bell Commission, the district court system, and I agree with Michael's conclusion, was a hodgepodge of 256 different courts with different jurisdictions, different forms of selection, and all funded at the local level. The 1962 amendment abolished all local courts, and forbid the General Assembly from creating any other courts other than those established in the constitution - this was implemented in '66, '68, '70. A 1958 special issue of the Institute of Government's periodical series, "Popular Government," covered 17 pages in small font to discuss the different forms of local courts: county courts, recorders courts, justice and the peace courts, and special courts on subject areas. The JP courts were presided over

justices of the peace who themselves were chosen by three different methods. In some counties, the superior court judge chose the justice of the peace. In about 30 counties, the legislature directly appointed the justices of the peace – I think including Wake County. In some counties, the JP's were chosen by the county commissioners. A large number of municipalities had recorders courts that handled traffic cases and other misdemeanors, and recorders, the English Law word for municipal judge. For instance, in the late 1960's Charlotte's recorder (judge) and recorders courts prosecuting attorneys were appointed by the city council, while in Chapel Hill the recorder was elected. And I'm old enough to remember being in Chapel Hill recorders court, not as a defendant, but along with a friend that was. The electoral system for superior court was very simple in the mid 1950's. Each superior court had but one judge. A second judge was added for superior court in Mecklenburg County in 1956, and a decision was made by the General Assembly to vary from the other election systems and treat that as a multi-seat race. So if there are two superior court seats on the ballot at the same election. The ballot will say vote for two, which is not true for Supreme Court, court of appeals, or district court. I don't know why that anomaly came, but I'm going to guess since it was put in in 1956 it had something to do with local politics in Mecklenburg County, since that bill dealt only with Mecklenburg County. The United States Supreme Court has never held directly, this is one person one vote, the judges are subject to the one person one vote doctrine that applies to congressional, legislative, and local governing board of redistricting. A 1991 U.S. Supreme Court Case said that judges don't represent people unless the principle does not apply. But in the 1989 superior court redistricting I did under guidance of legislators, I remember that urban counties such as Wake and Mecklenburg at the time had a deviation of about 25 percent. But neither district was changed in 1991 or 2001, and in the case of Mecklenburg was not changed in 2011. By the time the North Carolina Supreme Court held in 2009 in Blankenship vs. Bartlett, that one person one vote had some application. Districts in Wake County varied from 1 judge for 32,000 in one district, to 1 judge for 123,000, another 4-to-1 disparity. I understand in Mecklenburg it may be 5 or 6-to-1 at this point. The court held that the equal protection provisions of the North Carolina Constitution applied to apply some one person one vote standard. States are free to apply their own equal protection thing to require more protections for individuals than the federal courts might. I note here that question came up – the issue in Blankenship dealt only with sub-districts in one county, not between judicial districts. The court never mentioned the issue of whether Tyrrell and Hyde had to do with the population of Wake. The principal of strict scrutiny that led to the +/- 5 percent of deviation does not apply to judges, the court applied what it called intermediate scrutiny, where by larger deviations are allowed. The court said it was a test to balance important governmental interests and does not place a substantial burden on voters' interest. The court said that judicial districts will be sustained if the legislatures formulations advance important governmental interests unrelated (inaudible 3:43:57) and do not weaken voting strength. The court said that the 4-to-1 deviation in Wake County was a prime (inaudible) of considerable disparity between similarly situated districts. In order to trigger constitutional (inaudible) – they said similarly situated, so I think that is a reference back to other subdivided counties. Violated the North Carolina Constitution, and in future cases, plaintiffs must demonstrate to get a (inaudible) case, a disparity approaching the numbers struck down in Wake County. Now I don't know what it is in Durham, Cumberland, Forsyth, Guilford – I suspect it is not the same, but it is clearly my opinion that if a

lawsuit was brought in Mecklenburg County and the court would grant summary judgement, the facts are so clear, and the legislature could redraw the districts as was done under Blankenship in Wake County, or I suppose the court would do it if the legislature refused. The disparities largely occurred because of many of sort of the urban districts, black majority districts in these counties, were typically, at least until the last three or four years or so, tend to be much slower in growth than the rest of the county. Whereas the suburbs have seen a lot of in-migration, who basically have housing and sort of a ring around the center city. The General Assembly is of course is free to apply a +/-5 percent standards that apply in other districting. I have not looked at 717 to know whether the other districts what the percentage of deviation is but the legislature is certainly free to go way below that 4-to-1 ratio that the Supreme Court said was ok.

(3:45:44) Now I mentioned that Black Lawyers Association case from 1986. That case alleged, and that case just a few months after the U.S. Supreme Court opinion in Thorenburg vs. Jingles that set out the tests for what (inaudible) where blacks were denied the opportunity to elect candidates of choice. And the lawsuit was brought in the same districts that Jingles dealt with, because those facts had already been determined. It was brought as to Wake, Durham, Mecklenburg, Cumberland, Forsyth, Guilford, Nash, Edgecombe and Wilson. A 1-to-1 comparison with the districts in Jingles case. Now I won't repeat what section II says, but there is a three-pronged test in Jingles. The minority group must be able to demonstrate it is sufficiently large and geographical compact to constitute a majority in a single-member district. The minority group must show that it is politically cohesive. And the white majority vote sufficiently as a block to enable to defeat the minority's preferred candidate. And in the Jingles case, that was demonstrated in all districts, although it was reversed in Durham. So that had already been determined at the time. Now if this is (inaudible) again I don't know whether someone would have to show that those factors continue. If it is applied in another county, as Michael mentioned, if the court were to say that you can only do this to satisfy section II of the Voting Rights Act, then I think you would have to show in those other districts being divided that there was a section II violation. The state Supreme Court though has construed pretty broadly the divided into a convenient number of districts from time –to-time, and clearly ok (inaudible) when required by section II. So that was pretty clear in the Martin case. So that is something to keep in mind if this is expanded about whether there are any constitutional issues about dividing cases where there is not a section II violation.

(3:47:44) Now I have not examined the districts in HB 717 at any level of detail and have no current opinion on the way they could be subject to successful section II litigation. And nor do I have any opinion other than those three-pronged in counties like Wake and Mecklenburg, there might be a far different decision if the facts were applied from the last 10 or 20 years of voting then if you are looking at the 1960's and 70's voting. I would also note that reports that a significantly higher percentage of black superior district court judges are double-bunked that our white judges could trigger litigation under section II. I think that is something to be prepared to potentially deal with. How did we avoid this situation in 1987? Why weren't there a lot of double-bunking then when this current system was created? Well, here is what happened. In 1987 there were 7 special superior court judges. The bill needed to create 7 more

superior court judges than ordered the minority districts. So what happened is the legislature abolished all the special superior court judges at the end of their term but them immediately – there was some financial impact. Immediately assigned those soon to be vacated judgeships to the minority districts and Wake, Mecklenburg, Durham, Guilford, Forsyth, etc., so there was no double-bunking. I think somebody was retiring and might have been double-bunked if that didn't happen. That's how it was dealt with at that time, whether there is freedom to do that as part of this, I don't know. But that is how the legislature avoided double-bunking what then would have been white judges. Because I think there was only one black judge in the state at that point – superior court district. And the system of election being used can also effect section II litigation. For instance, we know we have gone from in 1987, all judges were elected in a partisan basis, and we converted to non-partisan. Early in 2017 session they were made partisan again, but before the next election we changed to a system where it is non-partisan plurality, but the name of your party appears on the ballot. Then there is different electoral vote results for black candidates (inaudible) Jingles since over 90 percent of blacks affiliate as democrats, the district might be 40 percent black, but in a democratic primary, 60 percent or more of the voters might be black, leading to a greater likelihood of a black candidate being the party nominee. In many of those districts there is substantial white democratic vote, a crossover (inaudible) support that candidate. In Martin vs. Preston some elections were basically cancelled so that a judge held over for two or four years, that was because the legislature is part of the (inaudible) was transiting to a system where all judges in a district came up at the same time so that there can be single-shot voting. So the reason those judgeships were elected – maybe 15 or 16 superior court judge terms were extended two to four years, which the court upheld was so they would in each district they would come up with (inaudible) so that voters would always be faced every year with a vote two or a vote for three, which much political science research shows enhances the ability of black candidates to win.

(3:51:15) Pretty much lastly, currently, there are four multi-county district court districts. There are specific seats to be reserved for judges who reside in a specific county. Those so called residency districts are also founded 20 of our 100 counties for boards and commissioners as well as 31 of 540 municipal governing boards, Durham for example. House Bill 717 proposes to expand residency districts to 7 superior court districts and a new total of 12 district court districts, thus moving from 4 to 19. I have some concern about whether the provisions of Article VI Section 6a of the North Carolina Constitution allow residency districts. That section states that every qualified voter who is 21 years of age should accept as in this constitution disqualified shall be eligible for election by the people. Article VI Section 8 says that any person who is qualified for running for an office is eligible to hold that office as long as you are 21 – an 18 year old can vote, but they are disqualified from holding the office, because they are required to be 21 – and there is disqualification for felonies. But the Supreme Court has repeatedly had that the General Assembly may not by statute add any further qualifications to hold office. Sprowell vs. Bateman in 1913 – the court voided a statutory requirement that recorders be attorneys, a decision reversed by a later constitutional amendment requiring judges to be attorneys. In Moore vs. Knightdale Board of Education, a provision that required incumbents to resign to run for another office was held unconstitutional, as adding an additional qualification for office that if you held an office you resign. The issue arises here

because if you have a district where, and I understand the interest, especially of protecting voters in a smaller county in a district – you might have a – if you wound up with – I don't think that is in the bill, but if you wound up with Chatham and Randolph, to say one district, one judge had to be in Chatham and three in Randolph, that protects the interest – I would think as the justification of the voters or attorneys in Chatham County, and for being able to serve as judges. But you have established a requirement that somebody was eligible and everyone in that district, all votes for all four judges, you have established that additional qualification that in order to run for office you live in a particular county in the district. Now, there has only been one case ever brought in North Carolina basically pretty much a case that somebody running for municipal governing board filed that was dismissed in superior court. But I do have some concern whether that is lurking out there. And as I mentioned the Wisconsin legislative redistricting case on partisan gerrymandering could affect things. And we also have a three judge court, federal court that heard a partisan gerrymandering case in North Carolina for congress just three weeks ago, and we may have an opinion from that court as well, so that is hanging out there. As we know that as mentioned, partisan gerrymandering struck down what then was a statewide election system for superior court judges as being deliberately designed to prevent Republicans from being elected. Although it avoided the issue of people being tried by a judge they didn't have the chance to vote for. So we traded one for the other, and that is my presentation. **(3:54:44)**